IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.396 OF 2003

1.The University of Mumbai through)
its Registrar, having office at)
University Building, M.G. Road, Fort,)
Mumbai-400 032.)..PETITIONER

Versus

1.Smt.Neela Bane, residing at 5,)
Pratham Deep CHS Ltd., Nandivli)
Cross Road, Ramchandra Nagar,)
Dombivli (E), Dist. Thane-421 201)
2.The State of Maharashtra through)
the Government Pleader, having office)
at PWD Building, High Court, Fort,)
Mumbai-400 032.)..RESPONDENTS

Mr. Mihir Desai with Mr. Rui Rodrigues & Mr. B.V. Phadnis for
the Petitioner.
Mr. Shaikh Nasir Masih i/b. M.P. Vashi & Associate for
Respondent No1.
Ms. S. Sreedharan, A.G.P. for Respondent No.2.

CORAM: F.I. REBELLO J.

DATE : 6th December, 2004

ORAL JUDGMENT:

. The petitioner by the present petition has impugned the judgment dated 6th September, 2002 passed by the Mumbai University College Tribunal in Appeal No.75 of 2001 preferred by a member of the non-teaching staff under Section 59 of the Maharashtra Universities Act, 1994. The Appeal was preferred to challenge the order dated 30th September, 2000 and 31st August, 2001 under which the respondent No.1's services were sought to be brought to an end by the University.

2. There is no dispute that the Respondent No.1 continued to be the employment of the University pursuant to various orders which came to be passed from time to time ordinarily for a period of 3 months from 1st October, 1997. On some occasions there were longer periods and on some occasion shorter period than 3 months. By the order of 30th September, 200 the respondent NO.1 was informed that in pursuance of the resolution of the Management Council at its meeting held on 29th September, 2000 her services have been discontinued with immediate effect i.e. from 30th September, 2000.

2. The respondent No.1 filed a complaint before the Industrial Court which passed an interim order on 4th October, 2000 which had the effect of allowing the respondent NO.1 to continue in service and report for duty. The Petitioner University then raised an objection as to the jurisdiction of the Industrial Court to entertain the complaint. That

objection was upheld. However, though the ad-interim order was vacated on 21st August, 2001 a direction was issued to maintain status quo until the Respondent No.1 received copy of the order passed by the Industrial Court. The copy was made available on 31st August, 2001. The University by their letter of 31st August, 2001 again discontinued the services of the respondent NO.1 on the ground that there was no stay from the Court of Competent jurisdiction. It is thereafter that the respondent No.1 herein preferred an Appeal before the University and College Tribunal. It was the contention of the respondent No.1 that her father was employed with the petitioners and he retired on 31st July, 1990. It was further contended that it was the practice of the petitioners to appoint son or daughter of the employees who were retiring and to that effect had issued various circulars. The respondent No.1 contended that her work was satisfactory and no memo or orders were issued to her. As and when required the respondent No.1 did O.T. and extra work to meet the exigencies. Despite all that the petitioner was not paying the salary as per the prescribed scale and other allowances. There are some other grievance as set out which need not for the time being, gone into. In fact she made various representations to be regularised. Instead of being regularised the respondent No.1 was informed that her services will be discontinued. She challenged the order of termination as being malafide, arbitarary, illegal and contrary to the provisions of law. It was also her case that similarly situated employees filed Writ Petition No.1844 of 1994 in

which the petitioner herein had filed consent terms and absorbed the said four employees and regularised their services. She, therefore, prayed that the orders of termination be set aside and she be reinstated.

. The petitioner University filed their reply. It was contended therein that when the University required the employees on permanent basis they have to send a proposal to the State Government and unless the Government sanctions the post no permanent appointment can be made. There are restrictions imposed on the petitioners by Section 8 of the Maharashtra University Act, 1994. In order to meet contingencies and with a view to complete the examination process and the allied work incidental thereto within the restricted period, the petitioner had to employ some employees on ad hoc basis. Such appointments are required to be made and the Management Council of the University under its authority fill in these posts on temporary basis. It is set out that the Standard Code is applicable to the non-teaching employees and the University is following the procedure of recruitment of the ad hoc staff as per the Standard Code and and makes appointment of these ad hoc employees. It is then set out that the regular recruitment procedure is also there in the Standard Code Rule 1984 for Non-teaching staff of Class III employees. The respondent No.1, it was contended, was not appointed in terms of Rule 3(III)(b)(1) as prescribed under Standard Code which are applicable for recruiting regular employees.

3. During the pendency of the proceedings the respondent No.1 applied to the College Tribunal to direct the petitioners herein to produce various documents including the details of sanctioned approved posts in respect of Class II and IV employees. The petitioner University filed their reply opposing the grant of said application. However, in so far as the number of posts is concerned they agreed to produce the details if the Court so directed. It appears that no order was passed on the application dated 20th July, 2002 made by the Respondent NO.1 herein.

4. By the impugned judgment the learned University & College Tribunal was pleased to allow the Appeal, set aside the order of termination and directed reinstatement of the respondent No.1 with continuity of services with all benefits which are available to a permanent employee. While allowing the appeal the learned Tribunal held that the respondent No.1 had appeared for a written test and further observed that it appears that she had passed the written test and, therefore, she was called for typing test. Even before the typing test she received a letter of appointment. The learned Tribunal also referred to Circular dated 19th June, 1995 whereby the University invited applications from candidates who were sons and daughters of University employees, the persons who had worked on temporary basis in the University or persons who are presently working on temporary basis in the University who have already registered their names with the Employment

Exchange for appointment on continuous temporary basis to Junior Clerk/Junior Typist-Clerk in the pay scale as set out therein. The learned Tribunal noted that it appears that the respondent NO.1 must have passed the typing test, otherwise she would not have been continued in the post after she was temporarily appointed for 3 months and continued thereafter for almost two years. The learned Tribunal then proceeded to hold that the University has sought to hide many things from the Tribunal. Various letters were referred to. The learned Tribunal adverted to the order passed in Writ Petition No.1844 of 1994 where the University had filed consent terms after the order passed on 31st May, 2000. The Tribunal noted that the four petitioners therein succeeded in getting regular appointment only by filing Writ Petitions. The learned Tribunal relied on various judgments cited for the proposition that the practice of appointing employees for a long period without regularising them was illegal. Judgments relied upon on behalf of the petitioners were distinguished and the Appeal was allowed.

5. At the hearing of this Appeal on behalf of the petitioners their learned Counsel firstly contends that in the instant case the post held by the respondent No.1 was not a regular post. A regular post can be sanctioned only with the consent of the Government and the same has not been done. Secondly, it is pointed out that there are Rules in force which require that before filling any of the regular posts to invite application by advertisement. In the instant case this

procedure was not followed as the appointment was not sought to be made on a regular basis. It is, therefore, submitted that once the recruitment Rules were not followed the respondent No.1 cannot claim that she was in the regular employment of the petitioners herein.

. On the other hand on behalf of the respondent No.1 her learned Counsel contends that the appointment was made pursuant to the powers of the Management Council and that her selection was pursuant to the Circular dated 17th April, 1994 by the petitioners itself. Attention was also invited to the Circular of 19th February, 1995 to the same effect. It is pointed out that though the respondent No.1 had been issued letter of appointment from time to time the fact remain that she was in continuous employment without any break. It is, therefore, submitted that in these circumstances this Court ought not to interfere with the order of the learned Tribunal in the exercise of its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

7. Having heard learned Counsel, the question that really arises is whether the order of the University & College Tribunal ought to be interfered with. There is no dispute that the respondent NO.1 was in the employment of the petitioners. Ordinarily unless the services are no longer required for want of sanction this Court would not continuance another temporary employee being brought in to replace the employee like the respondent NO.1 who otherwise had been

selected after following the procedure for temporary appointment. The question really is whether the appointment of respondent No.1 can be said to be a regular appointment and or a direction could be given to regularise the appointment. The law on the subject is now clear. There is a catena of judgments of the Apex Court to that effect. For a person to be considered to be in regular employment the requirement would be that there must be a regular post available, that post must be filled in by the recruitment Rules in force and by a Committee as constituted in terms of the Rules. It is only when all those requirements are met can the appointment of a persons be said to be regular. In the instant case from reference to the circulars of 17th April, 1994 and 19th June, 1995 it would be clear that they are for appointment on continuous temporary basis. The Circular restricted and/or conferred selection only to sons and daughters of the University Employees, the persons who had worked on temporary basis in the University or persons who are presently working on temporary basis in the University who have already registered their names with the Employment Exchange. In the matters of public employment every authority who satisfies the test of 'State or other Authority' within the meaning of Article 12 of the Constitution of India must satisfy the requirement of Articles 14 and 16. Public employment cannot be restricted to a particular class of person unless they fall in the categories which are constitutionally permissible. Otherwise all eligible must be entitled to apply and to be considered. The University is bound by the Maharashtra

Non-Agricultural Universities and Affiliated Colleges Standard Code (Terms & Conditions of Service of Non-Teaching Employees) Rule 1984. These Rules have been made in exercise of the powers conferred under Section 77A of the University Act including the Bombay University. We are concerned with Rule 3(III) Ministerial and Technical posts included in Class III. The procedure for selection to the post is also set out in Rule 4 which provides that all appointments which are required to be made by nominations or by selection shall be advertised in atleast two daily Newspapers, one of which shall be a Marathi newspaper indicating the minimum academic or other technical qualifications if any, experience required, pay scale and total emoluments admissible for the post, and the reasonable period (which shall not be less than 2 weeks from the date of publication of the advertisement in the newspapers) within which the candidates are required to submit their applications. Simultaneously these vacancies shall also be notified to the concerned Employment Exchanges and the concerned District Social Welfare Officers. The appointment to the Junior post including the Junior Clerks, Clerks and Clerk-cum-Typist are to be by selection. Once that be the case the petitioner University had to comply with the mandate of Rule 4 to make regular appointment. In the instant case it is clear, therefore, that the appointment was not made in terms of Rule 4. Once the appointment was not made in terms of Rule 4 it was not open to the respondent No.1 to contend that she was appointed on regular basis or for that matter for the Tribunal to proceed on the footing that the appointment

was on regular basis and directed reinstatement. In the ordinary course after the period of employment as set out in the appointment letter is over the person so appointed would no longer continue in the post. This is what the University had done by intimating the respondent No.1 that her services are longer required. The learned University and College Tribunal did not at all address itself to this issue though reference has been made to various judgments. Whether such persons who have been appointed for a longer period need to be regularised is an issue which will not be open to the Tribunal concerned, considering its limited jurisdiction. That can be agitated before appropriate forum where such an issue can be raised. Suffice it to say that the impugned order of the Tribunal having ignored the fact that the petitioner has not complied with Rule 4 and/or the appointment was without following the procedure of Rule 4, discloses an error apparent on the face of the record in having allowed the Appeal preferred by the Respondent No.1. In these circumstances the impugned order is liable to be set aside.

8. The attention of the Court, however, is invited to the fact that there are more than 100 employees who are similarly appointed and who continue to be employed. If that be so, the University if it seeks to terminate the employment of such employees must apply the principle of last come first go and or the Rules in force and cannot terminate a person who is longer in service unless there are other reasons. Even otherwise from the records filed by the petitioner it is clear considering the large number of colleges affiliated to it,

that it requires additional hands. It cannot create regular or permanent posts without the sanction of the State Government To obviate the difficulty in obtaining sanction the petitioner University has been making such temporary appointments from time to time. Considering that, persons like the respondent No.1 ordinarily ought not to be terminated for the vacancy to be filled up by another temporary employee. In such circumstances such persons ordinarily shall be allowed to continue till such time as the posts are filled in on regular basis. It will be in the fitness of things, therefore, that persons like the respondent No.1 if otherwise eligible and fit to be continued, be allowed to continue in the post till such time the regular candidate is selected or till such time as the University otherwise takes a decision in the matter of such persons who have been temporarily selected. It must, however, be made clear that any future temporary appointment cannot be restricted to a particular class but must be made from all eligible persons after following due procedure.

9. That leaves another question to be considered. The respondent No.1 is in service of the University right from the year 1997. Till such time the University takes a decision to fill up the post by a regular employee, persons like the respondent No.1 would be age barred and would be ineligible to apply if applications are invited. In my opinion the ends of justice would be met if in such cases the persons who are in employment for long periods after having been selected by the

Local Selection Committee for temporary appointment, if in their case requirement of age is relaxed, so that they can also be considered for regular selection. The University is directed in the event they decide to fill in the post which the respondent No.1 is holding or similar post by regular selection then to waive the requirement of age in so far as the Respondent No.1 is concerned.

10. Learned Counsel for the respondent No.1 had also made a grievance that the petitioner is not paying the respondent No.1 the salary of the post. Once appointment is made to a post, the petitioners cannot pay salary other than what is the regular salary of the post unless there are specific rules to the contrary. It is true that now the petitioners have paid to the respondent No.1 pay in the regular scale of the post. The petitioner is directed to continue to pay to the Respondent No.1 the regular pay scale attached to the said post and other benefits which may be admissible.

11. Considering the above, to my mind the ends of justice would be met if the impugned order of the Tribunal is set aside. However, the respondent No.1 will continue to be employed and be paid in the scale as set out in the body of the judgment, until regular appointments is made or the University takes a policy decision on such matters or otherwise finds it has to reduce the number of staff. Rule made partly absolute accordingly. The Writ Petition disposed of accordingly. There shall be no order as to costs.

(F.I.REBELLO, J.)